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Dale Berkeley Wilson v. Dr. Merrill L. Oldroyd : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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In the Supreme Court of the State of Utah

DALE BERKELEY WLISON,
Plaintiff and Respondent,

vs.

DR. MERRILL L. OLDROYD,
Defendant and Appellant.

No. 7969

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the State of Utah

DALE BERKELEY WLISON,
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vs.

DR. MERRILL L. OLDROYD,
Defendant and Appellant.

No. 7969

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

COMES NOW the defendant and appellant in the above entitled case and petitions the Court for a rehearing upon the following grounds:

1. This Court and the jury which tried the case in the court below were under a misapprehension as to the financial wealth of the defendant.

2. The Court and the jury have ignored certain evidence

of the plaintiff himself going to the nature of the marriage relationship of himself and his wife.

3. The opinion of the court errs in holding that there is nothing from which it can be determined that the verdict was reached as a result of passion and prejudice.

4. In holding that the instructions of the Trial Court to the jury did not constitute prejudicial error, this Court ignores without overruling established cases in this jurisdiction.

A brief in support of this petition is filed herewith.

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BRIEF IN SUPPORT OF PETITION FOR REHEARING
STATEMENT OF POINTS RELIED UPON

POINT ONE

THIS COURT AND THE JURY WHICH TRIED THE CASE IN THE COURT BELOW WERE UNDER A MISAPPREHENSION AS TO THE FINANCIAL WEALTH OF THE DEFENDANT.

POINT TWO

THE COURT AND THE JURY HAVE IGNORED CERTAIN EVIDENCE OF THE PLAINTIFF HIMSELF GOING

TO THE NATURE OF THE MARRIAGE RELATIONSHIP OF HIMSELF AND HIS WIFE.

POINT THREE

THE OPINION OF THE COURT ERRS IN HOLDING THAT THERE IS NOTHING FROM WHICH IT CAN BE DETERMINED THAT THE VERDICT WAS REACHED AS A RESULT OF PASSION AND PREJUDICE.

POINT FOUR

IN HOLDING THAT THE INSTRUCTIONS OF THE TRIAL COURT TO THE JURY DID NOT CONSTITUTE PREJUDICIAL ERROR, THIS COURT IGNORES WITHOUT OVERRULING ESTABLISHED CASES IN THIS JURISDICTION.

At the time this case was originally argued, Chief Justice Wolfe, who sat during the argument of the case, stated from the bench that he was contemplating resignation from the Court and requested that the parties consent that in the event of such resignation, the case might be determined by a four-man court or by a five-man court, including Chief Justice Wolfe's successor. Both parties agreed to this proposal. Chief Justice Wolfe did not resign from the Court but is still a member thereof. Nevertheless, he did not participate in this case. We are informed that this was because of the illness of the Justice. We are further informed that Chief Justice Wolfe has sub-

mitted his resignation to become effective late in April and so will probably be a member of the Court when this Petition for Rehearing is considered. It is therefore requested that Chief Justice Wolfe participate in passing upon the Petition for Rehearing submitted herewith or if this Petition is not considered prior to the effective date of his resignation, that his successor participate in considering the same.

POINT ONE

THIS COURT AND THE JURY WHICH TRIED THE CASE IN THE COURT BELOW WERE UNDER A MISAPPREHENSION AS TO THE FINANCIAL WEALTH OF THE DEFENDANT.

In commenting upon Dr. Oldroyd's financial worth, the Court in its Opinion stated: "Dr. Oldroyd is not only a successful practitioner, but also has considerable wealth in sheep, lands and other properties aggregating to several multiples of the judgment rendered against him." The above statement is not sustained by the evidence. In their arguments to the jury, counsel for the plaintiff spent more time pointing out the wealth of the defendant than they did arguing the merits of the case. The effect of this on the jury has been obvious and even though the jury was instructed by the Court that they could consider this matter only in connection with punitive damages, it appears that the members of this jury let this misconception as to Dr. Oldroyd's wealth affect their deliberations on compensatory damages as well. This Court has also misconceived the evidence as did the jury.

The evidence as to Dr. Oldroyd's financial status comes almost entirely from Dr. Oldroyd's own deposition, which was taken on the 15th day of February, 1952, more than nine months before the case came to trial. In this deposition, Dr. Oldroyd testified that he owned 2700 head of sheep, worth $30.00 per head, and 50 head of cattle on which no value was placed. Further comment on the value of these sheep will be made later. The doctor further testified that he owned 4500 acres of grazing land and had winter and summer grazing permits for 3,000 head of sheep. No value was placed upon the land or upon the grazing permits. He further testified that he owned $8,000 in Government Bonds; 1,000 shares of stock in the Commercial Bank of Utah on which the par value was $12.50; 180 acres of pasture ground; $30,000.00 in secured loans; $35,000.00 in accounts receivable; two automobiles; and miscellaneous tools and equipment.

This Court has held on a number of occasions that it can take judicial notice of general economic conditions. The Court, therefore, can take judicial notice of what happened to the livestock industry generally during the spring months of 1952. Wool dropped in price from $1.50 per pound to around $.50, which is still the price thereon. The price of sheep dropped in proportion, so that sheep worth $30.00 a head at the time the deposition was taken were worth only about $10.00 per head at the time of the trial, which still represents the fair value thereof. No value was placed upon the land. However, the facts are that much of it was purchased by Dr. Oldroyd for $2.00 per acre and would not exceed an average value of $5.00 per acre. Grazing permits, of course, are Gov-

ernment permits and while they have a value to the holder, may not be sold and so do not represent a source of money to Dr. Oldroyd. In regard to the $35,000.00 accounts receivable, certainly it could not be held that they should be appraised at face value. These are accounts receivable which Dr. Oldroyd has acquired over his years of practice, many of which are barred by the Statute of Limitations and most of which are uncollectible. Probably not more than 10 to 15% of these will ever be realized by the Doctor. However, even taking them at face value, the financial worth of Dr. Oldroyd at the time of the trial stacks up about as follows:

2700 head of sheep at $10.00	$27,000.00
50 head of cattle at $100.00	5,000.00
4680 acres of land at $5.00 per acre	23,400.00
Accounts receivable	35,000.00
Secured debts	30,000.00
Government Bonds	8,000.00
Miscellaneous automobiles, equipment, etc., on which a liberal allowance would be	4,000.00
1,000 shares bank stock at $12.50	12,500.00

These total approximately $146,000.00, less than twice the amount of the judgment rendered in this case rather than several times the amount of the judgment as was this court's impression. Even taking the sheep and accounts at the full value stated in February, the wealth of Dr. Oldroyd would be less than $200,000.00. Furthermore, the Court should bear in mind in this regard that on a forced sale the defendant will probably not be able to realize the fair market value of these assets.

Also any of the assets which he sells at a price above the price which he paid for them over past years will be subject to Federal Income Tax. Likewise, it should be remembered that the defendant cannot deduct the amount of this judgment from his income tax, and that the plaintiff takes the award income tax free.

It is submitted that if this Court was so in error as to this figure, the jury having no opportunity to review the record but having heard the evidence only once orally, would also be mistaken in their beliefs in this regard.

POINT TWO

THE COURT AND THE JURY HAVE IGNORED CERTAIN EVIDENCE OF THE PLAINTIFF HIMSELF GOING TO THE NATURE OF THE MARRIAGE RELATIONSHIP OF HIMSELF AND HIS WIFE.

In its opinion written in the case, this Court has reviewed in great detail the facts in the case in the light most favorable to the plaintiff. We agree that this is quite proper and the Court on appeal must consider that the jury found the facts in favor of the respondents so far as the evidence will permit. However, in making its statement of facts, the Court overlooks certain evidence that came from the plaintiff's own lips touching the nature of the marriage relationship, which evidence neither this Court nor the jury should overlook even finding the issues in favor of the plaintiff. Plaintiff admitted that he and his wife had discussed getting a divorce long before the evidence indicates that she ever knew Dr. Oldroyd (T. 152).

Furthermore, the plaintiff admitted that just the summer before the affair with Dr. Oldroyd developed he had created a scene on a public street when his wife was in company with a Dr. Steele, plaintiff accusing his wife and Dr. Steele of improper conduct (T. 186). Certainly both of these facts, taken in any light, casts considerable doubt on the mutual affection and trust between the plaintiff and his wife, yet it is evident that the jury in their verdict and this Court in reviewing their verdict have overlooked this evidence entirely.

POINT THREE

THE OPINION OF THE COURT ERRS IN HOLDING THAT THERE IS NOTHING FROM WHICH IT CAN BE DETERMINED THAT THE VERDICT WAS REACHED AS A RESULT OF PASSION AND PREJUDICE.

This Court takes cognizance of the fact that the judgment in this case is the highest returned in the State of Utah in a like case and is among the highest to be found anywhere. Counsel has already cited and the Court has taken notice of a few cases from other jurisdictions where as high or a higher verdict was upheld, but as the Court points out, each case must stand upon its own merits and the facts differ greatly in various cases.

The only Utah case which we have touching directly upon this point is the case of Smith v. Sheffield, 58 Utah 77, 197 Pac. 605, where a judgment of $25,000.00 against a comparatively wealthy man, but under circumstances more aggravated than in this case, was characterized by the Court

as "palpably excessive." While without question, the value of the dollar has greatly declined since the decision in the Sheffield case, its decline has not exceeded two-thirds in that time.

Each member of this Court has had extensive experience either as a trial judge or as trial counsel with jury verdicts in the State of Utah. It is the belief of counsel that each member of the Court would have to say that under ordinary circumstances the verdict in this case, tried before the average jury in Utah, would not exceed $15,000.00 at a maximum. The plaintiff himself in his testimony placed a maximum figure of $15,000.00 on his damages. The following language is found at page 190 of the Transcript where the plaintiff is testifying regarding a conversation which he had with his cousin Lee Nebeker, an attorney, shortly after he came into possession of the letter which played so important a part in this case:

> "And I had talked to him, I said, 'Lee, I am not interested in this as a lawsuit, I am concerned with my kids, and Geraldine is going to go her way and I am going mine.' And, I said 'Ten or fifteen thousand dollars wouldn't hurt Doc very much and it would set those kids up and insure an education for them, and that would be as far as I would be interested in going.' "

Where a jury brings back a verdict for damages in an amount of 5 times the amount of the damages fixed by the plaintiff, on what basis other than a desire to punish the defendant resulting from passion and prejudice of the jurors can such a judgment be explained?

While we recognize the fact that what the average jury

would do is not controlling upon what this particular jury must do, certainly there comes a point where it must be said that a verdict is so far out of line with the value that would be reached by the average prudent juror, that it must be held from the size of the verdict alone that it was arrived at on some other basis than a fair and impartial weighing of values, including financial loss, emotional distress and the other factors.

Indeed in most cases the only evidence that a verdict was reached on a basis of passion and prejudice would be the size of the verdict alone. It is impossible, of course, to look into the minds of the jurors or to question them upon the basis which they reached the verdict. Therefore, unless there is some gross error committed at the trial, which in itself would be ground for a reversal, there can generally be no evidence other than the size of the verdict going to the proposition that it was reached on the basis of passion and prejudice.

This Court held in the case of Wheat v. Denver & Rio Grande Western Railroad Co., 250 Pac. (2d) 932, that if a verdict is so excessive as to show that it must have been motivated by passion and prejudice, that a reduced verdict should not be ordered but a new trial granted in its entirety. If then, we are to say that before the average prudent jury, this verdict would not exceed $15,000.00, must we not as a matter of logic say that a jury returning a $75,000.00 verdict did not arrive at its verdict on the basis of reason and logic but upon the basis of passion and prejudice. Our position on this point is borne out by the treatment which the Court makes of punitive damages in this case. In considering punitive damages, of course, we must consider that portion of the verdict

by itself as it is returned upon a different basis entirely than is the verdict for compensatory damages. However, as this Court held in the case of Evans v. Gaisford, 247 Pac. (2d) 431, and as it again points out in this case, punitive damages standing alone must not be so disproportionate to the injury and the actual damage as to plainly manifest that they were the result of passion and prejudice. This Court has determined that the maximum amount which the jury should have found as punitive damages in this case was $5,000.00. The jury found $25,000.00 or five times the amount that this Court found that in reason and logic they could have found.

Once again referring to the case of Wheat v. Denver & Rio Grande Western Railroad Co., 250 Pac. (2d) 932, we point out that this Court has already held that the size of the verdict alone, in the absence of other evidence, may show that it was arrived at by passion and prejudice where it is so disproportionate to the injury that no other basis can explain the disproportion.

The question which must now be answered is: How disproportionate to the injury must the verdict be before it can be held to have been arrived at by passion and prejudice on the basis of the size of the verdict alone? Counsel can find no case in which this Court or any other Court has cut a verdict by 80% and still allowed the balance to stand. In the case of Collins v. Hughes and Riddle, 278 Northwestern, 889, the jury awarded $15,000.00 for a spinal injury. The Trial Court reduced the verdict to $5,000.00 The Appellate Court held that the verdict should not be reduced 66 2/3% and still allowed to stand, but that where such a cut was necessary in

order to bring the verdict into line with reason, it should be sent back for a new trial entirely.

Once again we urge upon the Court that at some point of disproportion we must say that by the size of the verdict alone that in justice it was reached on the basis of passion and prejudice. Is this when the verdict is one hundred times what is fair and equitable; when it is ten times what is fair and equitable; or, as the Nebraska Court holds, when it is three times what is fair and equitable? Certainly, when the verdict, as in this case, is five times what is fair and equitable under the evidence as this Court has held in regard to the punitive damages, it certainly must be said that it is so disproportionate to the injury as to indicate that the verdict was arrived at on the basis of passion and prejudice. If the punitive damages were arrived at on the basis of passion and prejudice, could it then logically be said that the compensatory damages arrived at by the same jury in the same deliberation on the same evidence were in no way affected by passion or prejudice.

In a recent case of Lehman v. Neuman Transit Co., Civil No. 97011, Third District Court, decided before Judge Ellett and in which case one of the counsel for Dr. Oldroyd was the counsel for the plaintiff, the jury returned a verdict of $42,000.00 against the defendant for negligently causing the death of plaintiff's wife. In that case there was no question of the husband himself having contributed to the injury, nor was there any question that the wife had been a devoted and loving companion and that by her death the husband had suffered as much as a husband can suffer by the loss of a wife, yet in that case Judge Ellett held that a verdict of $42,000.00 was

excessive and ordered that a new trial be granted unless the plaintiff accept a reduction to $25,000.00.

POINT FOUR

IN HOLDING THAT THE INSTRUCTIONS OF THE TRIAL COURT TO THE JURY DID NOT CONSTITUTE PREJUDICIAL ERROR, THIS COURT IGNORES WITHOUT OVERRULING ESTABLISHED CASES IN THIS JURISDICTION.

Counsel wishes again to urge upon the Court the position that the giving of Instruction No. 6 constituted prejudicial error. Again we wish to point out that this instruction is almost identical in its language with the instruction for which the case of Buckley v. Francis, 6 Pac. (2d) 188, was reversed, the minor difference being that in the Buckley case the court instructed the jury that the law presumes love and affection between a husband and wife, whereas in this case the Court instructed the jury that the law presumes the possibility of a reconciliation between an estranged husband and wife. We agree completley with the statement of the court that the fact that a husband and wife are estranged does not allow a stranger to interfere with impunity. However, the degree of damages is directly related to the possibility or probability of reconciliation just as the degree of damages is directly related to the presence or absence of love and affection between a husband and wife. If, in the Buckley case, the jury had found that there was no love and affection between the wife and husband, no substantial verdict could be returned and therefore it was

held prejudicial error for the court to direct the jury that there was a presumption of love and affection where there was already evidence in the case where the jury could find without resort to a presumption. In this case, if the jury were to find from the evidence that there was no possibility for a reconciliation between plaintiff and his wife before the acts of the defendant complained of, then there would be no basis upon which the jury could have found any substantial damages. The defendant had introduced evidence designed to show and which, if believed by the jury would show, that there was no possibility of such a reconciliation. If the court had instructed the jury in effect "You shall determine from the evidence whether or not there was a possibility of reconciliation" certainly the law would be properly stated, but the court instructed the jury that the law presumes such a possibility. In other words, the instruction was equivalent to saying, "In spite of the evidence to the contrary, you are to consider this case on a basis that there was a possibility of a reconnciliation." Counsel cannot see how it answers this problem to say that the jury may not have interpreted the language in this fashion. Why would this jury put any different interpretation on this language than did the jury in the Buckley case, and yet the court in that case held that the language placed the jury in such a position that it would have to weigh a presumption against the evidence. Here, as in the Buckley case, the instruction goes not so much to the fundamental elements of the cause of action as to the measure of damages, and certainly in this case it is obvious from the size of the verdict that the jury must have found that there was a possibility of a reconciliation. In doing this, the plaintiff had in favor

of his contention no evidence, but only the instruction of the court as to a presumption. Counsel urges that this instruction constituted prejudicial error and that the court should not speculate upon the interpretation which the jury placed upon the words when it is evident that they might well have placed an interpretation thereon that would be highly prejudicial to the defendant in this case.

CONCLUSION

Counsel submits that justice requires a rehearing in this case. Members of the bar and members of the lay public to whom counsel have talked have generally expressed surprise and amazement at the size of the judgment as originally rendered and as modified by this court. To compel the plaintiff to pay the amount of the modified judgment would be an injustice of the gravest character.

Respectfully submitted,

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